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No. 09-981

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IN THE

Supreme Court of the United States

JOHNSON CONTROLS, INC.; SECURITY GROUP, INC. AND SUBSIDIARIES, INCLUDING SARGENT & GREENELEAF, INC.; WILLIS NORTH AMERICA, INC. AND AFFILIATES; BUNZL USA, INC. AND SUBSIDIARIES INCLUDING MAK-PAK, INC.; TREDEGAR CORPORATION, INC. AND SUBSIDIARIES; RAYCOM TV BROADCASTING, INC., AS SUCCESSOR-IN-INTEREST OF COSMOS BROADCASTING CORPORATION AND AFFILIATES,

Petitioners,

v.

JONATHAN MILLER, SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET OF THE COMMONWEALTH OF KENTUCKY; COMMONWEALTH OF KENTUCKY, DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF *AMICUS CURIAE* KENTUCKY CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

MARK F. SOMMER
Counsel of Record
JENNIFER Y. BARBER
GREENEBAUM DOLL & MCDONALD PLLC
3500 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202-3197
(502) 587-3570
mfs@gdm.com

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE [1]

Pursuant to Supreme Court Rule 37.3, the Kentucky Chamber of Commerce ("Chamber"), as *amicus curiae*, respectfully submits this brief in support of Petitioners.

The Chamber is the largest broad-based business association in the Commonwealth, representing the interests and views of more than 2,700 member companies engaged in diverse commercial, industrial, agricultural, civic and professional activities throughout Kentucky – and through partnerships with more than 80 local chambers of commerce, essentially represents more than fifty percent of Kentucky's private workforce.

The Chamber is a trade group, created under Kentucky law as a non-profit corporation; the Chamber has obtained tax favored status from the Internal Revenue Service pursuant to 26 U.S.C §501(c)(6). The mission of the Chamber is to provide leadership to, and serve as a consensus-builder and advocate for, the advancement of business in Kentucky.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. Consent letters from lead counsel for the parties consenting to the filing of this brief are being submitted herewith.

[2] For a more detailed description of the Chamber's history, membership and mission, see http://www.kychamber.com.

As the principal voice of Kentucky businesses, the Chamber works to enhance the economic and business climate of the Commonwealth and thus has a pecuniary interest in this case because the bulk of its members are Kentucky taxpayers – the Kentucky Supreme Court's decision at issue herein has created legal uncertainty and critical instability as it pertains to the scope of a state legislature's power to enact retroactive tax legislation and meaningful backward-looking relief for taxpayers under the Due Process Clause. Judicial clarity is needed as such legal uncertainty impacts current businesses and taxpayers in Kentucky, and may very well hinder future business development therein.

SUMMARY OF ARGUMENT

The Chamber submits this brief as *amicus curiae* in support of the brief of the Petitioners (all petitioners collectively referred to as "Johnson Controls"). As states across the country are facing continuous revenue shortfalls and are ever so aggressive in their challenge to bring in more dollars and balance their budgets, the playing field is becoming increasingly disparate between state governments and private businesses such as those represented by the Chamber.

The petition for a writ of certiorari should be granted for the Court to consider the important policy interests implicated by *Johnson Controls v. Revenue Cabinet*, 296 S.W.3d 392 (Ky. 2009), and to provide guidance to the Commonwealth as a whole, its elected officials and to all Kentucky taxpayers regarding the limits controlling a state's legislative branch to retroactively legislate, particularly in matters of taxation.

The Chamber asserts that the Kentucky General Assembly ("General Assembly"), supported by the Kentucky Revenue Cabinet [n/k/a Kentucky Department of Revenue] (hereinafter referred to as "Revenue Cabinet" [as that is how the Kentucky Supreme Court and Petitioners have so referred]), has and continues to further a fiscal agenda of systematically and improperly retroactively legislating in matters of taxation, thereby stripping Kentucky taxpayers of their Due Process and Equal Protection rights, all in an impermissible effort to raise and protect state revenue. *Johnson Controls* is the final straw, one in which even the majority of the Kentucky Supreme Court has enabled such an agenda.

The numerous and repeated amendments made to the Kentucky statutes at issue in *Johnson Controls* designed to thwart the payment of the refund claims otherwise due to Johnson Controls should have been a red flag to the Kentucky courts, which at each and every level had the opportunity to correct this overreaching action.

Accordingly, the Kentucky Chamber supports the instant petition for a writ of certiorari because the Kentucky Supreme Court's Opinion results in uncertainty and instability in the application of Kentucky tax laws and consequently does a grave disservice to businesses in Kentucky.

REASONS FOR GRANTING THE PETITION

A. *Johnson Controls* Advances a Political Agenda Whereby In Application Kentucky's General Assembly Has Unfettered Authority to Protect the Commonwealth's Revenue Stream, Thereby Unlawfully and Unfairly Stripping Kentucky Taxpayers of Any Guidance Regarding or Consistency In Enforcement of Kentucky Tax Laws

1. *Johnson Controls* Is An Egregious Example of Kentucky's Ability to Legislate On an "As Needed" Basis to Protect Its Revenue at the Expense of Kentucky Taxpayers' Due Process Rights

Chief Justice John Marshall stated in *M'Culloch v. Maryland*, 17 U.S. 316, 327 (1819), "an unlimited power to tax involves, necessarily, the power to destroy," to which Justice Oliver Wendell Homes further stated, "the power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928). As states across the country, including Kentucky,[3] struggle with raising revenue and balancing budgets during the worst economy in generations, this Court now more than ever should focus on appeals from state court decisions alleging improper state taxation – or here, improper denial of a state tax refund.

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[3] A recent Center on Budget and Policy Priorities Study shows that all fifty states had a budget gap in fiscal year 2009. Kentucky, in particular had a $722 million budget gap. *See* Center on Budget and Policy Priorities, *Recession Continues to Batter State Budgets; State Responses Could Slow Recovery*, Table 4 at p. 10, *available at*: http://www.cbpp.org/cms/?fa=view&id+711.

Johnson Controls sets the scene for Kentucky's, and - in practical application - all other states', ability to retroactively legislate result-driven laws to protect Kentucky's revenue "as needed" and more importantly, do so at the expense of Due Process for Kentucky business taxpayers.[4]

Johnson Controls is a prime example, one where the General Assembly, apparently with impunity, amends and re-amends relevant statutes and Budget Bills in order to authorize the Revenue Cabinet to bypass applicable judicial decisions. It should be of no surprise to this Court that this now "standard procedure" of the General Assembly concerns Kentucky business taxpayers, as it results in ambiguity and inconsistency in the application of Kentucky tax laws, disregard of the precedential and consequential effect of Kentucky tax cases, those of this Court and those of other jurisdictions, and violates fundamental Due Process and Equal Protection. The playing field is not level in Kentucky.

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[4] *Johnson Controls* is only one of many examples of Kentucky tax policy gone awry. For instance, in addition to *Johnson Controls*, two other Kentucky tax cases have been petitioned to this Court during the 2009 Term alone. *See Monumental Life Ins. Co. v. Dep't of Revenue*, No. 09-865, *Petition for Certiorari filed* (U.S. Jan. 22, 2010) (wherein taxpayers allege improper taxation of retirement/pension assets in violation of ERISA preemption); *Mark Treesh v. DirecTV and Echostar Satellite*, No. 09-355, *Petition for Certiorari filed* (U.S. Oct. 26, 2009) (regarding whether Section 602(a) of the Telecommunications Act preempts direct-to-home broadcast satellite programming).

> Taxes should be "certain, and not arbitrary . . . clear and plain to the contributor, and to every other person." Today, taxes are uncertain, arbitrary, and unclear. Common sense has been stood on its head.
>
> — prominent banker Walter B. Wriston, quoting Adam Smith[5]

To coin a phrase, the concerns of the membership of the Chamber are no different than those of Johnson Controls herein.

From the Kentucky Supreme Court's massive 3-1-2, 63-page Opinion, which includes an erudite 31-page dissenting opinion, one concludes that there is one thing that the majority, concurring and dissenting opinions all agree on: the numerous legislative amendments that occurred during the four year legislative timeline of *Johnson Controls* were *solely* to protect state revenue and to usurp the remedy lawfully provided to taxpayers, including Johnson Controls, by *GTE v. Revenue Cabinet*, 889 S.W.2d 788 (Ky. 1994). *See Johnson Controls*, 296 S.W.3d 392 (Ky. 2009).

Some context on *GTE* and unitary taxation is appropriate. For the sixteen years preceding 1988, the Revenue Cabinet had allowed otherwise qualified businesses to file combined returns under the unitary business concept – but in 1988, the Revenue Cabinet began interpreting Ky. Rev. Stat. ("KRS") 141.120 [Division of income of interstate business for tax purposes; apportionment] to disallow the filing of a

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[5] Adam Smith was a famous economist and author of *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Methuen and Co. (1776).

combined tax return using the unitary business concept. Accordingly, Johnson Controls initially filed separate entity corporation income tax returns, but when *GTE*, 889 S.W.2d 788 (Ky. 1994), was issued and the Kentucky Supreme Court held that related corporations could file a combined tax return under the unitary business concept, Johnson Controls and numerous other taxpayers timely sought to amend their returns in order to claim a refund of taxes deemed overpaid.

Applying hindsight today, the optics are clear that in Kentucky, this was the beginning of the end for taxpayer certainty and "reliance" on Kentucky tax laws and the administrative enforcement thereof. As illustrated by the dissent, it is virtually impossible to reconcile how the Kentucky Supreme Court majority could put pen to paper and correctly describe the facts that it did in its Opinion, yet still reach the decision that it did. As the Kentucky Supreme Court Opinion sets forth, the Revenue Cabinet acted on *some* refund claims, but failed to act on Johnson Controls'. *See Johnson Controls*, 296 S.W.3d at 404. Next came the legislative maneuvers.

Subsequent to *GTE*, the Revenue Cabinet estimated *GTE* related refund claims to be worth approximately $50 million. In response to worry concerning the claims of $50 million, the General Assembly enacted House Bill 599 to statutorily prohibit the filing of unitary combined returns for tax years ending on or after December 31, 1995. *See Id.* at 404; 1996 Ky. Acts c. 239, §§ 1 & 3.

In October 1996, the Revenue Cabinet upped the ante and estimated the unpaid refund claims to be approximately $160 million; this amount rose to $177 million by April 1997. In response to the threat of the

$177 million in claims, the General Assembly included in its 1998-2000 Budget Bill a measure which prohibited the Revenue Cabinet from paying any post-*GTE* refund claims. *See Id.*; 1998 Ky. Acts c. 615, § 33.

By June 1998, the estimate of unpaid *GTE* unitary related refund claims according to the Revenue Cabinet had snowballed to approximately $200 million, with $65 million of that being interest thereon. In response to this, the General Assembly enacted House Bill 541 to substantially amend KRS 141.200 to prohibit refund claims attributable to taxable years ending on or before December 31, 1995 when claimed by an amended return filed after December 22, 1994 and based on a change in filing status from separate returns to unitary returns and to prohibit corporations from filing unitary returns for tax years ending before December 31, 1995, unless the corporations filed unitary returns on or before December 22, 1994, for tax years ending before December 22, 1994; this new amendment purported to undo any effect *GTE* might have had prior to 1995. *See Id.*; 2000 Ky. Acts c. 543, § 1.

All together, these four sets of legislative changes over the course of four years were all solely tied to the asserted dollar amount of the so-called *GTE* refunds. Nowhere in the Opinion was there discussion indicating that a substantive reason, *i.e.*, other than the dollar amount of the refund due, existed to not pay Johnson Controls the claimed refunds. While the Revenue Cabinet argued in *Johnson Controls* that *GTE* was wrongly decided, the only time the Kentucky Supreme Court addressed this was in its dissenting opinion, which stated that, "the Cabinet's invitation to indulge in such

revisionism should be rejected, not simply because of *stare decisis*, but because *GTE* was right." *Johnson Controls*, 296 S.W.3d at 421.

It is staggering to think that the Kentucky Supreme Court rendered a decision that would cause so much confusion and uncertainty in Kentucky tax laws, all based solely upon the alleged ever exponentially increasing dollar amount of the refund claims. Herein, the General Assembly and Revenue Cabinet are putting in practice tax policy as described by Jean-Baptiste Colbert, famous French Minister of Finance under King Louis XIV:

> The art of taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the least possible amount of hissing.

2. *Johnson Controls* Has Triggered Numerous Policy and Equity Issues On Which This Court's Guidance Is Much Needed

Legal questions aside, the *Johnson Controls* saga raises many policy questions, including: What is the effect of the *GTE* case and other cases that the Revenue Cabinet refuses to follow? What weight do decisions of the Kentucky courts have when the General Assembly can bypass same retroactively? How can Kentucky taxpayers rely on tax statutes, regulations, administrative guidance and cases when they are not being enforced? Do Kentucky taxpayers *really* have a constitutionally sufficient tax remedy?

This Court's guidance could not come at a better and more critical time. Private businesses are struggling as much as state governments are; the need for revenue is no less for private businesses in this economy. The playing field must be evened out in Kentucky.

B. The Kentucky General Assembly Assisted By the Revenue Cabinet Has and Continues To Improperly Retroactively Legislate Despite Its Clear Understanding of the "Proper" and "Correct" Way to Legislate In High Dollar Areas of Taxation

1. Kentucky's General Assembly Is No Stranger to Overruling Kentucky Supreme Court Decisions and Is Not Ignorant of How to Properly and Correctly Draft Legislation to Fulfill a Legitimate Purpose While Not Trampling Over Kentucky Taxpayers' Due Process Rights

In a relatively recent example involving taxes where the General Assembly got it right – at least with curative legislation – the General Assembly legislatively reversed the Kentucky Supreme Court's decision in *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39 (Ky. 2000), and in doing so demonstrated an awareness of the constitutionally correct means of legislating in the face of potentially huge tax refunds.

In this precedent setting 4-3 split decision, the Kentucky Supreme Court ruled that a retailer that also engaged in some manufacturing on its business premises nonetheless still qualified for the sales and use tax manufacturing exemption for "machinery for new and expanded industry." In reversing the lower court

decisions, the Kentucky Supreme Court gave a broader interpretation to the meaning of "plant facilities" for purposes of the exemption than that advanced by the Revenue Cabinet. In a decision which later became widely referenced by other cases, the Kentucky Supreme Court stated that the exemption statutes and the regulations were silent as to the meaning of "plant facilities." Importantly, the Kentucky Supreme Court rejected the Revenue Cabinet's long-standing administrative interpretation of "plant facilities," and stated that it was up to the General Assembly to change the law and make it more clear if the legislature wanted the exemption to be more restrictive; further, that the General Assembly "could define plant facilities differently or specifically address combined manufacturing and retail sales facilities." *See Id.* at 45. At its very first chance post-*Camera Center*, the Kentucky General Assembly did just that.

Faced with a possible shortfall of revenue then publicly estimated in the hundreds of millions of dollars as a result of the Kentucky Supreme Court's decision in *Camera Center*, the General Assembly passed, and the Governor signed into law, an amendment to KRS 139.170[6] [Sales and Use Tax definitions] that added, among other provisions, a definition for "plant facilities." *See* 2001 Ky. Acts c. 68, § 1. While the General Assembly statutorily eliminated restaurants, grocery stores, shopping centers and other retail establishments from coverage within the new definition, the General Assembly legislated the amendment to KRS 139.170 effective as of the date of the *Camera Center* decision; thus, the amendment did not deprive Camera Center of its remedy, nor did it

[6] KRS 139.170 was later repealed and reenacted as KRS 139.010. *See* 2008 Ky. Acts c. 95 § 4.

retroactively apply to deprive the potentially thousands of other taxpayers who had been claiming [or who could claim, under applicable refund claim rules] the machinery exemption or refunds derived therefrom for years prior to the *Camera Center* decision.

Kentucky's concern for protecting revenue is the same in *Camera Center* as in *Johnson Controls*; however, the General Assembly chose to legislate properly and correctly in *Camera Center* – fixing the foreseeable revenue problems going forward while providing taxpayers with due process and a remedy required for same. One distinction could be that in *Johnson Controls* the claims are advanced by less than two dozen non-Kentucky based corporate taxpayers, whereas in *Camera Center* the benefit involved could have been claimed by countless Kentucky based corporations, sole proprietorships and other small businesses, representing countless registered voters.

In contrast, and only one legislative session later, the General Assembly sought to retroactively legislate some 20 years prior, presumably in response to a then pending matter, *Circuit City Stores, Inc. v. Revenue Cabinet*, No. K00-R-24 (Ky. Bd. Tax App.), which involved refund claims for tangible personal property tax paid by a corporation located within a federally "designated" Foreign Trade Zone. At issue was whether the corporation had to be located within an "activated" [as contrasted with a "designated"] Foreign Trade Zone in order to utilize the more favorable Foreign Trade Zone tangible personal property tax rates provided by KRS 132.020 [State ad valorem taxes] and KRS 132.200 [Property subject to state tax only].

Near the dismissal of the case in 2002, the General Assembly hand in hand with the Revenue Cabinet amended KRS 132.020 and KRS 132.200 to provide that in order to qualify for the tax breaks, the tangible personal property involved must be located in a zone that "is activated in accordance with the regulations of the United States Customs Service and the Foreign Trade Zones Board." *See* 2002 Ky. Acts c. 324 ("House Bill 715"). While a legislature may always change the law, within reason and limits, of particular importance here is that the General Assembly scribed a preamble to House Bill 715, which stated,

> WHEREAS, it is necessary to clarify the General Assembly's *original intention* that the state tax rate and local exemption from tangible personal property tax is limited to tangible personal property that is located within the boundaries of an activated area, within a foreign trade zone or zone site....

Id. at Preamble (emphasis added).

Thus, the 2002 Regular Session of the Kentucky General Assembly attempted to apply its amendment retroactively to the first time the Foreign Trade Zone provision appeared in a Kentucky statute, 20 years prior in 1982, by stating that the 2002 amendment reflected the "General Assembly's original intention." *See* 1982 Ky. Acts c. 229, § 2. Simply stated, it is patently unreasonable for the 2002 Regular Session of the General Assembly, whose composition is without a doubt markedly different, perhaps even 100% different, from that of its brethren circa 1982, to arbitrarily find,

determine and recite the "intention" of a General Assembly sitting 20 years prior, and then retroactively apply the statute consistent therewith.

These two examples are representative of the many examples of the now all too common and seemingly unfettered actions of the General Assembly in retroactively legislating on Kentucky tax matters, and reiterates the need for this Court to confirm that a modesty requirement, as argued by Petitioners and discussed *infra*, exists under *United States v. Carlton*, 512 U.S. 26 (1994), and controls in *Johnson Controls*.

2. While *Johnson Controls* Involves Tax Refunds From Older Years, Kentucky Continues to Retroactively Legislate In Matters of Taxation

The amendments at issue in *Johnson Controls* are certainly not the end of the General Assembly's spate of improper retroactive tax legislation. As recent as the 2009 Regular Session, the General Assembly once again enacted retroactive legislation to deprive taxpayers of interest on their tax refunds/claims for many years prior. *See* 2008 Ky. Acts, c. 132, § 8 ("House Bill 704") and 2009 Ky. Acts c. 86, § 7 ("House Bill 216"). As Justice George Sutherland has stated,

> The powers of taxation are broad, but the distinction between taxation and confiscation must still be observed.

Burnet v. Wells, 289 U.S. 670, 683 (1933) (dissenting opinion).

The foregoing sums up the most recent events in the ongoing saga of confiscatory retroactive tax legislation in Kentucky.

Before 2008 House Bill 704, the interest rates used by the state for tax assessments and tax overpayments were the same. In 2008, the General Assembly, via House Bill 704, amended certain Kentucky tax statutes to set the interest rate charged by the Commonwealth on tax assessments at a floating rate of prime plus 2%, and on refunds at prime minus 2%, creating a 4% rate differential. It also delayed the accrual of interest in a refund circumstance to now begin after the latest of: a tax return's original due date, extended due date, actual filing date, date of payment, or an amended return filing date, each of which results in a loss of interest to taxpayers with outstanding refund claims.

House Bill 704 provided that these changes would be applied "retroactively to all outstanding refund claims for taxable years ending prior to the effective date of this Act and shall apply to all claims for those taxable years pending in any judicial or administrative forum." *See* 2008 Ky. Acts, c. 132 § 8. Thus, in Johnson Controls' situation this would go back to 1990 or so, then roughly 18 years prior.

This legislation, even without its retroactive application, made the playing field for state government and private companies in Kentucky even more disparate. The retroactive application of same further demonstrates the overtness of the General Assembly

when it comes to achieving its fiscal agenda at the expense of businesses in Kentucky.[7]

An 18 year retroactive effective date is per se "immodest." *See infra*, p. 16. There is no better an example of unfettered authority in practice than a General Assembly that: (1) passes precedent setting retroactive legislation to minimize the refund interest period and rate for Kentucky taxpayers; (2) applies such legislation retroactively, approximately 18 years for some taxpayers; (3) does so in a manner that raised proven constitutional concerns that House Bill 704 was not properly passed in one Regular Session; and (4) summarily passes House Bill 216 to replace it during the next Regular Session.[8]

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[7] To strengthen the point that the proverbial "train" has jumped the tracks, House Bill 704 was not enrolled or signed by both presiding officers before midnight of April 15, 2008 – the last day of the legislative session – and was not timely presented to the Governor for signature until April 16, 2008. House Bill 704 was therefore not properly enacted. *See* Ky. Const. § 42 (stating that in even-numbered years the General Assembly must complete its work by April 15th); Ky. Const. § 56 (stating that bills must be signed by both presiding officers, enrolled and "immediately present[ed]" to the Governor for signature); *see also Williams v. Grayson*, No. 08-CI-856 (Franklin Cir. Ct., Div. I Jan. 21, 2009) (holding that House Bill 79 [which was enacted in the same manner and Regular Session as House Bill 704] was not validly enacted because of the Kentucky General Assembly's failure to deliver the bill to the Governor before its adjournment as a matter of law by midnight April 15, 2008) ([ ] added). In response to the controversy surrounding the passage of House Bill 704, the General Assembly simply proffered and enacted House Bill 216 in 2009, the text of which was identical to House Bill 704.

[8] *See Id.*

C. The Retroactive Legislation of House Bills 704 and 216 Is Similar to that in *Johnson Controls* – All Violate Fundamental Principles of Due Process

It has long been held by this Court that when a taxpayer successfully challenges a tax overpayment,[9] the Due Process Clause of the Fourteenth Amendment requires that the state must provide meaningful backward-looking relief (meaning refunds). *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22 (1990); *see also Revenue Cabinet v. Gossum*, 887 S.W.2d 329 (Ky. 1994) (Kentucky "enacted refund statutes that provide that Kentucky taxpayers who have paid taxes above what they are legally required to are entitled to refunds").[10] Taxpayers are entitled to a "clear and certain

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[9] Interest is part of an "overpayment" pursuant to KRS 131.183 ("Interest shall be allowed and paid upon any overpayment . . . ."); *see* KRS 131.010(7) (defining "tax" as including "any assessment . . . administered by the department . . . ."); *see also* KRS 141.235(3) and KRS 134.580(1)(a).

[10] The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Ky. Const. § 2 ("Section 2") provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Section 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law." *Kentucky Milk Marketing and Anti-Monopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (citation omitted).

remedy" in tax refund claims. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 445 (1998). Further, a state cannot "reconfigure its scheme, unfairly, in midcourse," or engage in "bait and switch" tactics. *Reich v. Collins*, 513 U.S. 106, 111 (1994).

> Taxation without representation is tyranny.
>
> — James Otis, statesman during the American Revolution

But taxation without representation is exactly what the General Assembly has done in *Johnson Controls* and continues to do through House Bills 704 and 216 by having a tax scheme unfairly reconfigured in midcourse whereby mandatory interest on a tax refund is statutorily mandated as a legal remedy [KRS 131.183] and in some instances required under the Constitution when taxes are overpaid, but then arbitrarily withdrawn from taxpayers having an overpayment on a retroactive and discriminatory basis.

The seminal test for determining if retroactive tax legislation is valid was set forth by this Court in *United States v. Carlton*, 512 U.S. 26 (1994), which is at direct challenge in this action. This Court held that in order to survive constitutional scrutiny, retroactive tax legislation must be "supported by a legitimate legislative purpose furthered by rational means" and any retroactivity period should be "modest." *Id.* at 32. Justice O'Connor's concurring opinion recognized that "a period of retroactivity longer than the year preceding the legislative session in which the law was enacted

would raise . . . serious constitutional questions." *Id.*[11] It also noted that retroactive tax legislation had only been upheld where it was applied "for only a relatively short period prior to enactment." *Id.* at 38.

The Kentucky Supreme Court's Opinion in Johnson Controls recognized that "modesty" could play a role in determining whether retroactive legislation is constitutional, but rejected the notion that due process imposes a requirement of same. *See Johnson Controls*, 296 S.W.3d at 399 ("Retroactive application of a statute . . . requires an analysis of the facts and circumstances of each case, rather than applying a specified modesty period."). Other states, however, have recognized *Carlton*'s "modest" retroactivity requirement and have held that retroactivity periods of two and three years violated due process. *See In re Garden City Medical Clinic, P.A.*, 137 P.3d 1058 (Kan. App. 2006); *Rivers v. State*, 490 S.E.2d 261, 265 (S.C. 1997); *S&R Properties v. Maricopa County*, 875 P.2d 150, 158-59 (Ariz. App. 1993).

In addition to Kentucky's business taxpayers' need for this Court to protect their constitutional rights amid Kentucky's ongoing politicized fiscal agenda, *Johnson Controls* is a perfect opportunity for this Court to clarify that *Carlton* does in fact impose a *modesty* requirement, and to use its bully pulpit to educate the state legislatures across the country on the limits of retroactive legislative powers:

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[11] *See also United States v. Darusmont*, 449 U.S. 292 (1981) (stating that retroactive changes in tax law are only valid *if* they apply to the calendar year in which the change took place).

> The Court's great power is its ability to educate, to provide moral leadership.
>
> — Justice William O. Douglas, *Time* magazine interview (Nov. 12, 1973)

CONCLUSION

For the foregoing reasons, *amicus curiae* Kentucky Chamber of Commerce requests that the petition for a writ of certiorari to the Supreme Court of Kentucky in *Johnson Controls, Inc. et al. v. Miller* be granted.

Respectfully submitted,

MARK F. SOMMER
Counsel of Record
JENNIFER Y. BARBER
GREENEBAUM DOLL & MCDONALD PLLC
3500 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202-3197
(502) 587-3570
mfs@gdm.com

Attorneys for Amicus Curiae